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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 903

WILLIS SMITH

Petitioner,

versus

UNITED STATES OF AMERICA

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit.

JOSEPH A. ST. ANA
Counsel for Petitioner
1123 duPont Building
Miami 32, Florida

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OCTOBER TERM, 1958

No._____

WILLIS SMITH,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit.

The undersigned counsel on behalf of Willis Smith, prays that a Writ of Certiorari issue to review the judgment entered in this case on April 3, 1959, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Order of the District Court is unreported and is printed in Appendix "B", infra (p. A. 3). The opinion of the Court of Appeals has not yet been reported and is printed in Appendix "B", infra. (p. A. 4).

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1).

QUESTIONS PRESENTED

(1) Whether remarks of a trial judge during the course of criminal proceedings within the presence of the jurors deprived the petitioner of a trial by a fair and impartial jury.

(2) Whether the petitioner has been deprived of any review of prejudicial remarks by a trial judge during the course of criminal proceedings by a denial of an appeal on the merits for an insufficient record and a denial of civil relief under 28 U.S.C. § 2255, without the benefit of a hearing, when uncontroverted facts were submitted as to matters dehors the record that went to the validity of the criminal proceedings.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment of the Constitution is set forth in Appendix "A", infra, (p. A. 1). The statutory provisions of 28 U.S.C. § 2255 are set forth in Appendix "A", infra, (p. A. 1).

STATEMENT OF THE CASE

Petitioner was tried and convicted of a criminal violation of the Harrison Narcotics Act, 26 U.S.C., § 4744(a)

Prior to the commencement of the trial, but after the case was called and the jury venire was sworn, the trial judge made certain remarks which attributed violent and unlawful tendencies to both the petitioner and his friends. Unfortunately these remarks were not objected to at the time, however, petitioner's new counsel properly raised the question on motion for new trial. This motion was denied. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the judgment as the record did not disclose that the remarks were heard by any person who was later sworn as a juror in the cause. **Smith v. United States**, (5 Cir. 1958), 252 F.2d 120. On motion for rehearing, the affidavits of five jurors were offered to show that the remarks were heard by jurors who actually considered the case. The motion was denied and certiorari was denied, 357 US 908. Subsequently petitioner filed a motion to vacate and or new trial under 28 U.S.C. § 2255 alleging matters dehors the record (i.e., the remarks of the trial judge before a jury) which went to the validity of the trial. The motion was supported by affidavits of five jurors, the petitioner and his wife. The Government filed no Answer or counter-affidavits. The district judge denied the motion without benefit of a hearing or an order setting forth findings of fact and conclusions of law. (See Appendix "B", infra, p. A. 3). On appeal to the United States Court of Appeals for the Fifth Circuit, the case was affirmed by a divided court. (See Appendix "B", infra, p. A. 4). The basis of the majority opinion in affirmance was:

(1) The petitioner was attempting to review the merits of the cause by 28 U.S.C., 2255 instead of by appeal.

(2) The issues involved had been disposed of by a previous appeal.

(4) The question of prejudice to the jurors cannot be raised after failure to submit affidavits in support of the motion for new trial.

(5) The affidavits of the individual jurors do not assert that they were prejudiced by the remarks.

(6) The facts presented are not sufficient to warrant recognition as plain error under Rule 52(b), Federal Rules of Criminal Procedure.

(7) The record conclusively shows that the petitioner was entitled to no relief.

In the dissenting opinion, Circuit Judge Rives contended that the petition, together with the uncontroverted affidavits clearly demonstrate a violation of the petitioner's rights guaranteed under the Sixth Amendment of the Constitution. According to Judge Rives, this violation was so clear that no hearing was needed to prove that the petitioner was not given a trial by a fair and impartial jury.

REASONS FOR ALLOWANCE OF THE WRIT

(1) The decision of the court below in the instant case, insofar as it holds that petitioner was attempting a review of the merits which had been disposed of by a prior appeal, departs from the accepted and usual course of judicial proceedings so as to call for an exercise of this court's power of supervision. The Court of Appeals

has, in effect, denied to the petitioner all avenues of review whereby the petitioner has sought to call to the court's attention the fact that he was deprived of a trial by a fair and impartial jury. In the prior appeal on the merits, **Smith v. United States of America**, (5 Cir., 1958), 252 F.2d, 120, the court held that appellate review would be inadequate as the record did not disclose that any person later sworn as a juror heard the remarks of the trial judge. In the instant decision, after the petitioner sought to call to the court's attention certain matters dehors the record (viz, that the remarks of the trial judge were heard by five jurors) by a collateral attack authorized under 28 U.S.C. § 2255, the court held that the petitioner was seeking review of matters properly raised by appeal and, in fact, actually disposed of in the prior appeal. Thus, in attempting to chart a course between the limitations of appeal and the restrictions of § 2255, the petitioner is left in a procedural hiatus by a ruling on appeal that precludes review for an insufficient record and a refusal to hear the petitioner's collateral attack under § 2255, which attempted to correct the deficiencies of the record, holding that the matters raised are reviewable only by appeal.

The decision in the instant case has the effect of destroying the provisions of § 2255 by providing no relief wherein it is alleged that matters dehors the record go to the validity of the trial itself. In this respect, it is in direct conflict with this court's pronouncement in **United States v. Hayman**, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232, wherein procedural safeguards were guaranteed to those seeking to avail themselves the relief provided by 28 U.S.C. § 2255.

(2) The decision of the court below in the instant case, insofar as it holds that the remarks of the trial judge could not be reviewed as plain error under Rule 52(b), Federal Rules of Criminal Procedure, is in direct conflict with the holding of the District of Columbia Circuit in **Robertson v. United States,** (D.C. Cir., 1948), 171 F.2d 345. The present decision holds that failure to object to remarks of a trial judge (which affect the petitioner's right to a fair and impartial trial) and failure to submit affidavits of jurors when alleging the error on Motion for New Trial is fatal to the petitioner's right to review these remarks by appeal or § 2255. The petitioner contends that this holding conflicts with the generally accepted theory of law which requires the court to recognize errors which substantially affect the right of an accused to a fair and impartial trial even though these errors were not objected to in the first instance. **Robertson v. United States,** supra. See also **Thomas v. District of Columbia,** (D.C. Cir. 1937), 90 F.2d 425.

The petitioner contends (as does the dissenting opinion) that it would not be incumbent upon counsel for the petitioner to provide affidavits of the jurors when urging the prejudicial remarks of the trial judge as the trial judge would already know that the remarks were made in the proximity of the jury.

(3) The decision of the court below in the instant case, insofar as it holds that the affidavits of the jurors are insufficient for failure to assert prejudice, is in direct conflict with the decisions of other circuits and the established law in this matter and so far depart from the normal course of judicial proceedings as to call for an exercise of this court's supervisory powers. It is a well

settled general rule of law that a trial judge must refrain from making any remarks that will **tend** to prejudice the defendant in the eyes of the jury. 39 AmJur., NEW TRIAL § 76; 88 C.J.S., TRIAL §§ 49, 51. Insofar as the decision below holds that a defendant must show that the jury was actually prejudiced by the improper remarks, it directly conflicts with the holding of the Sixth Circuit in **Chalupiak v. United States,** (6 Cir. 1955), 223 F.2d 522. Insofar as the court below held that it could not notice plain error in a trial judge's improper remarks, it is in direct conflict with **Durham v. United States,** (D.C. Cir. 1956), 237 F.2d 760. This Court's power to supervise and delimit proper conduct of federal trial judges is in no way circumscribed by a lack of actual prejudice in the mind of the jury. cf **Thiel v. Southern Pacific Co.,** 328 U.S. 219, 225 (1946). It is sufficient to show error by testimony of a juror as to the "existence of any extraneous influence", the prejudice resulting therefrom need not be shown. See **Mattox v. United States,** 146 U.S. 140, 149 (1892).

(4) The decision of the Fifth Circuit, insofar as it holds petitioner's motion for statutory relief can be denied without the requisite preliminary of a hearing, is in conflict with and departs from the accepted and normal course of proceedings in such matters as established by the decisions of the Fifth and other circuits and this court, and calls for an exercise of this court's supervisory powers. The explicit language of 28 USC, § 2255 clearly contemplates a hearing on every motion but those most conclusively lacking merit and frivolous due to the value and worth of this procedure upon a Motion to Vacate. See **United States v. Hayman,** supra, cf **Price v. Johnston,** 334 U.S. 266, 291-292, 68 S.Ct. 1049, 92 L.Ed. 1356;

Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed 1302. In light of the failure of the Government to contradict in any way, or even deny the allegations, they should be taken as true (**Bailey v. United States** (D.C. Cir. 1957) 246 F.2d 698; **Hill v. United States** (6 Cir. 1958) 256 F.2d 957) and the cause remanded for a new trial (see opinion of Rives, J., dissenting below). See **Dunn v United States** (6 Cir. 1957) 245 F.2d 707. If however the court below could properly consider that the motion and the attached exhibits did not clearly establish a right to appropriate relief, it was at least obliged to grant a hearing at which the truth of the serious questions of fact alleged could be finally and fairly determined. See e.g. **Ziebart v. United States,** (5 Cir. 1950) 185 F.2d 125; **Wheatley v. United States** (10 Cir. 1952), 198 F.2d 325; **Sanders v. United States** (5 Cir. 1953), 205 F.2d 125; **Smith v. United States** (5 Cir. 1953), 223 F.2d 750; **Steinberg v. United States** (5 Cir. 1958), 256 F.2d 143. "If perchance these allegations be true appellant might well be entitled to relief under § 2255. For this reason the District Court was required by § 2255 to conduct a hearing and to follow the procedures therein set forth." **Watson v. United States** (D.C. Cir. 1958) 262 F.2d 33.33-34. The question of the scope and extent of the rights provided by § 2255 are "important and complex". **Ladner v. United States,** 358 U.S. 169, 79 S.Ct. 209.211, 3 L.Ed. 2d 199 The decision of the court below has so confused and unsettled the law established by prior decisions that an exercise of this court's supervisory powers is essential to proper administration of a vital statutory right.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIS SMITH,
Petitioner

By: _____
JOSEPH A. ST. ANA
Attorney for Petitioner
1423-24 duPont Building
Miami 32, Florida

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APPENDIX A

CONSTITUTION OF THE UNITED STATES

Amendment VI—Jury Trial For Crimes, and Procedural Rights

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

28 USCA § 2255—Federal custody; remedies on motion attacking sentence.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served

upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, § 114, 63 Stat. 105."

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION.

No. 9957-M-Civil.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIS SMITH,

Defendant.

ORDER

This cause coming on to be heard on defendant's motion to vacate sentence and or grant new trial, and the Court having previously heard argument on defendant's motion for new trial, and having considered the affidavits submitted in support of the motion, and being otherwise fully advised in the premises, it is therefore

ORDERED, ADJUDGED AND DECREED that the motion to vacate sentence and or to grant new trial be, and the same is, hereby denied.

DONE AND ORDERED at Miami, Florida, this the 4th day of August, 1958.

/s/ EMETT C. CHOATE,
United States District Judge.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17425

WILLIS SMITH,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 3, 1959.)

Before RIVES and TUTTLE, Circuit Judges, and SIMPSON, District Judge.

TUTTLE, Circuit Judge: This is the second appearance of this case here. Smith was convicted under the Harrison Narcotics Law and sentenced to five years imprisonment. After his sentence he engaged new counsel who filed a motion for new trial, the principal basis of which was considered by the Court in *Smith v. United*

States of America, 252 F. 2d 120. This ground was that, in open court in the presence of prospective jurors, the trial court made comments claimed to be highly prejudicial to appellant just prior to commencement of the trial.

Answering a motion of appellant's then counsel O'Quin for a list of the government's witnesses, the court said:

> "You know the Federal Rules. The list of government witnesses are not furnished in criminal cases for very cogent reasons, in my opinion. Some of them would probably disappear during the trial."
>
> Mr. O'Quin:
>
> "I don't see how the court—"
>
> The Court:
>
> "Here we have a narcotics case. Grave penalties are involved. There is a great temptation to interfere with witnesses."
>
> Mr. O'Quin:
>
> "The government has ways of punishing them."
>
> The Court:
>
> "That doesn't bring back a fellow that might disappear some night. There are plenty of people in this court that would be glad to interfere with witnesses. I know you wouldn't do it.
>
> "It has long been settled in Federal cases that a list of witnesses is not furnished except in civil cases."

The trial court overruled the motion and we affirmed, saying as to this particular ground:

> "The accused fails to show that the Court's criticized answer to his motion was made within the hearing of any person who was later chosen and sworn as a juror in the case."

On motion for rehearing in this Court, appellant sought to prove by affidavit the fact that the court's remarks had been heard by jurors who actually sat in the case. This motion was overruled. It was not competent for this Court, of course, to review a denial of motion for new trial by considering facts not presented to the trial court in the motion. The Supreme Court denied certiorari, 357 U.S. 908.

Appellant then filed this motion under 28 U.S.C.A. § 2255, asserting that there are facts dehors the record that go to the validity of the trial itself. This contention is that the trial court, by making the quoted remarks within the hearing of the jurors who had already been accepted and were sitting in the jury box[1] in a small courtroom in-

[1] This is alleged in the petition and supported by nearly identical affidavits of five of the trial jurors as follows:

"On June 18, 1957, I was a member of the panel of prospective jurors summoned for jury duty in the District Court of the United States for the Southern District of Florida, Miami Division. To the best of my recollection there were 35 to 40 prospective jurors in attendance.

"On the said date I was accepted by counsel for the United States and the defendant, Willis Smith, and was sitting in the jury box of the south-east Courtroom of the Federal Building in Miami. This Courtroom is very small, I believe being approximately 20' x 47'. Conversation of the judge and attorney can be easily heard and understood by anyone in this Courtroom.

"After being sworn as a member of the jury panel, but prior to being sworn as a member of the jury accepted to try this case,

dicated his belief that this defendant would be a party to a physical assault on prospective government witnesses; that this colloquy so disturbed appellant's counsel O'Quin as to cause him to leave the courtroom without consulting with the accused, leaving him in the hands of an associate, whom neither the accused nor his wife had ever before seen and with whom they had had no consultation; that the lawyer, under no authority from them, then proceeded to attempt the defense without protecting appellant's rights by moving for a continuance or other relief because of the court's remarks in the presence of the jury.

The trial court dismissed the petition without a hearing.

It is too well established to require elaboration or comment that a petition under Section 2255 cannot serve the office of an appeal on the merits. So, too, is it clear that issues disposed of on a previous appeal will not be reviewed again on petition. *Malone v. United States*, 6 Cir., 257 F. 2d 177.

I, Gaines Wilson, while sitting in the jury box, did hear the Honorable Judge Emett C. Choate engage in argument and general conversation with the attorney for defendant, Willis Smith. The argument and remarks I heard were regarding the defendant's attorney's request for a list of witnesses having to do with this trial that was to be heard by Judge Choate.

"I have recently read the first few pages of the transcript of trial proceedings and I clearly recall that the conversation and remarks therein written were actually made as written therein by the Court Reporter.

"I do not know of any of the persons involved in this matter, either socially or professionally, and have no pecuniary interest in this matter, nor have I been promised any reward or favor of any nature or kind by any person in connection with the execution of this my true affidavit."

In order to make effective appellant's contention that he had been prejudiced it was necessary for him in his motion for new trial to supplement the record to show that persons who later served on the trial jury had at least heard the criticized remarks of the trial judge. This could have been done by the filing, in support of his motion for new trial, of the affidavits which are now filed in support of the Section 2255 petition. This is, thus, simply a second effort to obtain an appeal on the merits on a ground that was insufficiently raised on the motion for new trial. This remedial statute was not intended to and it cannot accomplish that result. No reason is assigned why the affidavits now submitted in support of this motion could not have been obtained and submitted in support of the motion for new trial. The motion, therefore, does not present such a state of facts as to warrant the use by the court of the extraordinary powers granted under Section 2255.

In the previous appeal we did not reach the further objection urged by the government for disregarding this ground of appeal; that counsel made no motion for continuance or for interrogating the venire as to whether they had heard the court's remarks, in order to prevent any possible adverse effect on the jury. This objection is again made here by the government. It is countered by appellant by his assertion that a subsequent colloquy with the trial judge left his counsel in such a state that, following a short recess, he failed to return to the courtroom and left appellant's defense in the hands of an unauthorized associate. This lawyer's name was entered on the docket as an associate of O'Quin's firm.

The fallacy of this argument is that it is in conflict with the petition and affidavits when coupled with that part of the record which stands approved by appellant. The brief for appellant asserts that:

> ". . . Subsequently, a heated exchange took place between the district judge and attorney O'Quin which does not appear in the record. During this exchange, the district judge threatened to hold attorney O'Quin in contempt of court. Thereupon a recess was called and upon the reconvening of court, attorney O'Quin was no longer present. These facts do not appear in the original record but if they did, *they would appear at the bottom of page 11* of the original record *just prior to the jury being sworn at the opening* statement." (Emphasis added.)

Assuming the correctness of this statement by counsel as to what occurred and the time it occurred, then the record completely refutes the contention that no one was given a reasonable opportunity to protect appellant's interest following the court's statement. Immediately after the court made its statement, O'Quin said:

> "All right, your Honor, we are ready for trial. We take exception to the Court's ruling."

He then made a motion that the rule be invoked as to witnesses. This was granted. He then made a motion to exclude the government's principal witness which the court denied. The court then said:

> "If you insist that Mr. Rudd testify first so that you may save his hearing the other wit-

nesses before he testifies, I will consider that motion."

Mr. O'Quin:

"I know Mr. Rudd. If he was the prosecutor I wouldn't mind him being in here but being the witness, I do."

The Court:

"Your motion will be denied. Somebody from the Government should be here."

It is at this point then that counsel says that there was omitted from the record the colloquy and the recess.

We think it is without dispute that there was ample time and ample opportunity for appellant's personally chosen counsel to take whatever protective steps were indicated before he left the courtroom. Appellant does not argue that anything that was done thereafter during the trial by the associate gives rise to any basis for attacking the validity of the trial. Ordinarily, of course, failure by trial counsel to make an appropriate motion for relief in such a situation leaves nothing to appeal from, for the appellate courts are for the purpose of reviewing errors of law caused by orders and rulings of the trial court. Normally the trial court is not put in error for acts or omissions that are not brought to its attention by motion or request for ruling. Rule 51 F.R.Cr. P. *Moore v. United States*, 5 Cir., 161 F. 2d 932. See *Thompson v. United States*, 3 Cir., 283 F. 895.

Especially since, even with the affidavits taken at their face value, there is still no assertion that any juror

realized that the court's statement in any way related to the case they were later to try, since they had not yet been sworn, we conclude that this is not such a case as would warrant our dealing with it under the plain error provisions of Rule 52 F.R.Cr.P. This weakness in appellant's case is fatal even though the point could be considered following our previous affirmance of the denial of the motion for new trial, which we have already indicated it cannot be.

The trial court was not required to hold a hearing on the Section 2255 petition since it conclusively appeared from the "files and records" of the case that appellant was entitled to no relief.

The judgment is AFFIRMED.

RIVES, Circuit Judge, dissenting:

This appellant is serving a five-year penitentiary sentence imposed as the result of a jury verdict. Five members of the jury have sworn that they heard the trial judge reply to the motion of appellant's counsel for a list of the Government's witnesses, that, if furnished, "some of them would probably disappear during the trial. . . . That ways of punishing doesn't bring back a fellow that might disappear some night. There are plenty of people in this court that would be glad to interfere with witnesses."

The record shows that the judge made those statements. There has been no hearing to ascertain whether all or others of the jurors also heard them, but from the size of the courtroom, approximately 20 feet by 47 feet, the inference is clear that they did. In any event, if five jurors or a single juror was prejudiced by the statements, a new trial is called for. In the small courtroom, there must have been few, if any, besides the appellant and his friends and witnesses who would, according to the judge's statement, be glad to interfere with the Government witnesses or to cause their disappearance overnight.

The majority says, "there is still no assertion that any juror realized that the court's statement in any way related to the case they were later to try," probably implying that the jurors' affidavits do not affirmatively show that they were prejudiced by the judge's statements. Again, there has been no hearing to develop the facts. The record of the original trial, however, shows that, just before the prejudicial statements were made, the court had called for trial the case of "*United States vs. Willis Smith*," and that the statements themselves were specifically directed to this appellant's case; for example, "Some of them (Government witnesses) would probably disappear during *the* trial. . . . *Here* we have a narcotic case. . . . There *are* plenty of people in *this* court that would be glad to interfere seriously with witnesses." (Emphasis supplied.) One indulges not merely in wishful thinking but in utter futility, when he imagines that the jurors did not understand that the judge was referring to appellant's case. If there had ever been any validity to the notion that

jurors hear only what is intended for their ears, it was dissipated in this instance by the affidavits of the five jurors that more than a year after the trial they still remembered the statements. Moreover, the proceedings at that point must have attracted the interest of everyone, for the exchange had become spirited, and was almost immediately followed by a threat to punish Mr. O'Quin, appellant's attorney, for contempt.

Unless the affidavits of the five jurors and of the appellant and his wife are contradicted, I would think that a hearing is not necessary to prove prejudice on the part of the jurors. Jurors, like judges, should be free both from actual prejudice and from reasonable suspicion of prejudice. A hearing would likely be as unsatisfactory as was the examination of the jurors on voir dire. A juror is not usually so expert in psychology as to appreciate the effect which the judge's statements might have upon him. It is a common human trait for a man to fail to recognize his own prejudices, and practically every one of us considers himself, of all people, to be free from prejudice. A juror cannot be expected now, any more than upon voir dire, to admit that statements which the trial judge thought, albeit mistakenly, were fit to make in his presence, had the effect of poisoning his mind.[1] Nevertheless, we hold the appellant's liberty cheap indeed when

[1] I subscribe to the views expressed fairly recently by two of the Justices who, despite their frequent differences, think alike on this score:

Mr. Justice Black:

"The test of bias sufficient to exclude a juror for cause is not what the particular juror believes he could do. Long ago Chief Justice Marshall ruled that a person may declare that he feels no prejudice in the case, and yet the law cautiously

we underestimate the prejudicial effect on prospective jurors of such statements by a highly respected trial judge. If there be any doubt, at least the appellant should be afforded the opportunity of a hearing.

The majority says that the objection to the jury has been waived because not made forthwith before entering upon the trial. Without question that would have been the better practice. The record reveals, however, that within minutes after the prejudicial statements had been made by the trial judge, Mr. O'Quin, the attorney whom the appellant had employed, ceased to take any part in the trial. The only evidence in this record as to the circumstances under which Mr. O'Quin left the case is contained in the uncontested affidavits of the appellant and his wife to the following effect:

> "Many prospective jurors were seated in and about the Courtroom and the jury box held twelve (12) prospective jurors. Upon the call by the Court of my case, Mr. O'Quin made a motion for a continuance of this case on the ground that he was not prepared to go to trial for several reasons, one of the reasons being that he had been denied a list of the witnesses intended to be used by the Government at this

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incapacitates him from serving on the jury; because it suspects prejudice; because in general, persons in a similar situation, would feel prejudice.' 1 Burr's Trial 414, 415, 25 Fed. Cas. 14,692g, at p. 50." Dennis v. United States, 1950, 339 U.S. 162, 176.

Mr. Justice Frankfurter:

"Questions ought not to be put to prospective jurors that offer no fair choice for answer." Dennis v. United States, supra, 339 U.S. at p. 182.

trial. Mr. O'Quin engaged in a heated argument with the Court, all of which took place before the prospective jurors in the jury box and could be clearly heard throughout the small Courtroom. The discussion became so heated that the Judge made a comment to Mr. O'Quin concerning, and having to do with, possible contempt of Court by Mr. O'Quin and very shortly the Judge declared a recess of the proceedings and left the Courtroom.

"After the recess had concluded and the Judge returned to the Courtroom, Mr. O'Quin, the attorney retained by my wife to represent me, did not return, and in his stead . . . the young man whom I had seen earlier, undertook to represent me."

In my opinion, those circumstances do not show any considered and intelligent waiver of the valid objections to this jury panel.

Further, in my opinion, the judge's prejudicial statements in the presence of the jurors constituted such a plain error or defect affecting substantial rights that they should be "noticed although they were not brought to the attention of the court." Rule 52(b), Federal Rules of Criminal Procedure. Indeed, the judge himself made the prejudicial statements when he could see that the jurors were present. Without objection or further ado, it then became his positive duty to see that the appellant was not tried before jurors who had overheard those statements.

The Fifth Amendment protects the appellant against a deprivation of his liberty without due process of law. The Sixth Amendment guarantees his right to trial "by an impartial jury."[2] Those constitutional rights have been purchased with too dear a price for them to be sacrificed upon such a record as this.

The majority says that the appellant lost his rights because his counsel failed to secure the affidavits of the jurors in time to support his motion for new trial. It seems to me that appellant's counsel had no reason to anticipate that the affidavits were needed in a hearing before a trial judge who knew the facts as well as, if not better than, anyone else. Indeed, since the facts have been disclosed by the affidavits of the jurors, and because the trial judge is himself a witness, I think that, in the event of a hearing, this trial judge should hold himself disqualified. See *In re Murchison*, 1955, 349 U.S. 133,

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[2] "The Sixth Amendment requires that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' The Amendment prescribes no specific tests. The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law. There is no ground for contention—and we do not find that such a contention is made—that Congress has undertaken to preclude the ascertainment of actual bias. All persons otherwise qualified for jury service are subject to examination as to actual bias. All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror." United States v. Wood, 1936, 299 U.S. 123, 133, 134.

"Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." United States v. Wood, supra, 299 U.S. at 145, 146.
See also, Dennis v. United States, 1950, 339 U.S. 162, 172.

138, 139; *United States v. Holley*, 2nd Cir. 1957, 240 F.2d 418, 419.

As already stated, however, I do not think a hearing is necessary to prove that the appellant should not be deprived of his liberty upon the verdict of jurors who heard the trial judge state that if the defendant were furnished with a list of the Government witnesses, "Some of them would probably disappear during the trial. . . . Here we have a narcotic case . . . . (Punishment) doesn't bring back a fellow that might disappear some night. There are plenty of people in this court that would be glad to interfere seriously with witnesses." This record, I think, establishes that appellant has not had a fair trial "by an impartial jury," and that he is being deprived of his liberty without due process of law. I therefore respectfully dissent.

PROOF OF SERVICE

I, Joseph A. St. Ana, as attorney for Willis Smith, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the first day of May, 1959, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the United States, by leaving a copy thereof at the office of David Clark, Esq., Assistant United States Attorney for the Southern District of Florida, Miami Division, at Room 234, Federal Building, Miami, Florida, and by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

JOSEPH A. ST. ANA
Attorney for Petitioner
1423-24 duPont Building
Miami 32, Florida

Subscribed and sworn to before me, at Miami, Florida, this _____ day of May, 1959.

Notary Public, State of Florida
at Large

No. 903

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIS SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
WILLIAM J. SCHAFER, III,
Attorneys,
Department of Justice, Washington 25, D.C.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 4–17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1959. The petition for a writ of certiorari was filed on May 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was entitled to relief under 28 U.S.C. 2255 on an issue as to allegedly prejudicial remarks by the trial judge which had been raised on appeal.

STATEMENT

This case was previously before this Court on a petition for a writ of certiorari to review the affirmance of his conviction, raising essentially the same argument that petitioner raises here. See 252 F. 2d 120, certiorari denied, 357 U.S. 908 (No. 954, O.T. 1957).

Petitioner was convicted in the United States District Court for the Southern District of Florida of having obtained marihuana without payment of the transfer tax in violation of 26 U.S.C. (Supp. V) 4744(a) and sentenced to five years' imprisonment (R. 27–30).

When the case was called for trial, Mr. O'Quin, one of petitioner's two defense counsel, requested a list of the government witnesses (R. 34). The District Court denied the motion and the following exchange took place (R. 35–36):

> The COURT. It will be denied.
>
> You know the Federal Rules. The list of Government witnesses are not furnished in criminal cases for very cogent reasons, in my opinion. Some of them would probably disappear during the trial.
>
> Mr. O'QUIN. I don't see how the Court——
>
> The COURT. Here we have a narcotic case. Grave penalties are involved. There is a great temptation to interfere with witnesses.
>
> Mr. O'QUIN. The Government has ways of punishing them.
>
> The COURT. That doesn't bring back a fellow that might disappear some night. There are plenty of people in this court that would be

glad to interfere seriously with witnesses. I know you wouldn't do it.

It has been long settled in Federal cases that a list of witnesses is not furnished except in civil cases.

Mr. O'QUIN. All right, your Honor. We are ready for trial. We take exception to the Court's ruling.

After conviction, petitioner made a motion for a new trial contending that the statements by the court on the motion to produce government witnesses, allegedly made in open court in the presence of prospective jurors, were highly prejudicial. The motion was denied (Pet. 3). In affirming the conviction, the Court of Appeals noted, *inter alia,* that there was no showing that the judge's ruling was made in the presence of, or was audible to, anyone who later became a juror. 252 F. 2d 120. Petitioner filed a motion for a rehearing submitting affidavits of five jurors who sat on the case, stating that they had heard the court's remarks. The motion was overruled. Thereafter this Court denied a petition for a writ of certiorari. 357 U.S. 908.

Petitioner then filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging that the trial court's remarks, heard by at least five jurors, resulted in denial of a fair trial. He also asserted that the colloquy by the court and Mr. O'Quin (petitioner's counsel) accompanying the court's remarks disturbed Mr. O'Quin so much that he left the case to his associate who thereafter failed to protect petitioner's rights (R. 1–4). This motion was supported by affidavits of five jurors stating that they had heard the court's

remarks and also affidavits of petitioner and his wife to the effect that, after recess, Mr. O'Quin did not return but left the trial to his young associate (R. 4–20). The district court dismissed the motion without a hearing (R. 21). The Court of Appeals affirmed the district court's dismissal, one judge dissenting. It held that 28 U.S.C. 2255 would not serve as a "second effort to obtain an appeal on the merits on a ground that was insufficiently raised on the motion for new trial" and that the record revealed no lack of effective representation by counsel (R. 145–158).

ARGUMENT

Petitioner's contention that he was prejudiced by the trial court's remarks was previously presented to the District Court on a motion for new trial, to the Court of Appeals on appeal from his conviction and motion for rehearing, and to this Court on petition for certiorari and motion to supplement the record. On his motion to vacate his sentence under 28 U.S.C. 2255, he alleged no new facts or contentions. He supported his argument with affidavits of five jurors stating that they heard the trial judge's remarks. These, however, were before the Court of Appeals on the motion for rehearing and this Court on petition for certiorari and motion to supplement the record. It is not the function of a proceeding under 28 U.S.C. 2255 to relitigate issues which could have been, and in this case were, considered on appeal. See *Sunal* v. *Large*, 332 U.S. 174, 179. The dissenting judge below considered the allegations of prejudice serious enough to raise an issue of jurisdiction, cognizable on collateral attack. However, as this Court

stated in *Sunal,* even as to jurisdictional issues, relief has usually been denied when the appellate procedure was available for correction of error, even though the question was not raised. Still less is it available where the question raised on collateral attack was actually considered on appeal.

Actually, as pointed out in the government's prior brief in opposition (No. 954, O.T. 1957), the remarks of the trial judge did not constitute reversible error, and certainly cannot be deemed a jurisdictional defect. Although the judge, in denying petitioner's motion for a list of government witnesses, explained that this was done to avoid tampering with the witnesses, he pointed out at the same time that he knew that defense counsel would not do such a thing. None of the affidavits of the five jurors states that he considered the remarks as relating to petitioner or that he was prejudiced by them. Each states simply that he was present when they were made and that he heard them (R. 4–13).[1]

[1] Petitioner does not in this Court raise any issue as to alleged ineffective representation. Although Mr. O'Quin did leave the case just before the trial commenced, he did indicate to the court that the defense was ready for trial. There is nothing to show that his departure was occasioned by the remarks as to witnesses. It is reasonable to assume that Mr. O'Quin's associate, who had been present with him in the courtroom, was prepared to try the case. Other than Mr. O'Quin's departure petitioner has brought forth nothing indicating a lack of effective representation beyond a general allegation of error of judgment.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys.

June 1959.

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